to suppose that the question of damages ever entered the minds of the contracting parties; much less that it was incorporated in their agreement, for contracts are made to be performed and not broken; and such an intention, if present at all, would have been voiced in a provision for liquidated damages. The rule may, perhaps, be best defended on grounds of public policy, as a broader liability might have a tendency to discourage business. But it is submitted that this argument would apply with equal force to tort liability, although the latter has apparently never been subjected to this restriction.[7]

However, the authority of the rule is generally recognized, although it is too flexible to furnish an absolute test. Indeed, since the cases which arise are too diverse to admit of any iron-clad rule, the vitality of *Hadley* v. *Baxendale* must be ascribed to the fact that the courts have found it a convenient cloak under which they could avoid giving full damages in situations where this would work an undue hardship on the defendant, yet in the absence of this element have had no difficulty in expanding it to give complete reparation when the ends of justice required. Thus, in *Cointat* v. *Myham & Son* (1913) 108 L. T. Rep. 556, where the plaintiff, a butcher, purchased infected meat from the defendant, he was allowed to recover for injury to his trade and custom occasioned by the resale, on the ground that knowing the nature of plaintiff's business, defendant must reasonably have contemplated that his breach would occasion such a loss.[8] But it has been frequently held, that it is not reasonable to suppose that the nature of plaintiff's business alone is sufficient to justify the inference that defendant could have had this loss in mind.[9] From a practical point of view, therefore, no serious fault is to be found with the rule, and it must be regarded as one of those numerous maxims adopted by the common law, which are unsound in point of logic, but are deemed, though perhaps they are not in fact, necessary to the administration of justice.

IMPEACHMENT OF WITNESS BY EVIDENCE OF CHARACTER.—One of the favorite methods of impeaching the credibility of a witness, which, of course, is always in issue, is to bring other witnesses to testify to his general reputation in the community. There has been no small conflict of opinion, however, as to whether reputation for general immoral character or merely bad reputation for truth may be shown. It would, indeed, be entirely logical to admit evidence of reputation for any

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[7] 1 Sedgwick, Damages (9th ed.) § 143. Of course, where negligence is the essence of the tort the question whether plaintiff's injury is a natural and probable result of defendant's act is material to determine whether reasonable care was used. This, however, is not to be confused with the measure of damages, for it is here important only in determining whether a cause of action ever arose. 1 Sedgwick, Damages (9th ed.) § 139.

[8] Hammer *v.* Schoenfelder (1879) 47 Wis. 455; Hammond & Co. *v.* Bussey (1887) L. R. 20 Q. B. D. 79. Where such an inference is clearly impossible, but where notice of the special injury was given before the breach, recovery was allowed in Bourland *v.* C. O. & G. Ry. (1906) 99 Tex. 407, the court evidently recognized that this removed any hardship on defendant, and so wisely avoided the rule.

[9] Dickerson *v.* Finley (1909) 158 Ala. 149; Holloway & Bro. *v.* White-Dunham Shoe Co. (C. C. A. 1906) 151 Fed. 216.

sort of character,[1] leaving the jury to consider the extent to which truthfulness is likely to be affected by general moral delinquency,[2] since otherwise the oath of a man of the laxest morals would be placed on equality with that of another possessed of every virtue.[3] It seems, however, more desirable from motives of expediency to limit the proof to reputation for veracity,[4] since the fact that the jury would occasionally be assisted in weighing the evidence is more than overcome by the danger of the prejudice such testimony tends to create against the witness.[5] Although particular acts of misconduct may equally tend to impeach the veracity of the witness, it is not permissible to show them by testimony of other witnesses, since, although a man is presumed to be able to protect his general reputation, he cannot be prepared to answer every accusation of alleged wrongful acts during the past;[6] and there is, moreover, in such cases, certain danger of confusing the issues.[7] Proof of the commission of a crime by record of a judgment of conviction is a logical exception to the exclusionary rule, for the reasons upon which the principle is based cease to exist; there can be no confusion of issues, since a judgment of conviction is conclusive, and there can manifestly be no surprise, since every man knows whether or not he has been convicted of a crime. Differences of opinion as to the nature of the crime which may be shown, correspond, in general, with the rules of admission of various sorts of reputation.[8]

The extent to which specific acts of a witness irrelevant to the main issue may be shown on cross-examination depends on very different considerations. Since the statements of a witness as to matters collateral to the issue cannot be contradicted,[9] the argument of confusion of issues does not confront the court, nor, for the same reason, is the element of surprise controlling, since the witness need only deny, and

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[1]Commonwealth *v.* Murphy (1817) 14 Mass. 387; State *v.* Efler (1881) 85 N. C. 585; State *v.* Boswell (N. C. 1829) 2 Dev. 209; Hume *v.* Scott (Ky. 1821) 3 Marsh. *260.

[2]Hume *v.* Scott, *supra.*

[3]Anon. (S. C. 1833) 1 Hill 251, 258.

[4]Bakeman *v.* Rose (N. Y. 1837) 18 Wend. 146; Commonwealth *v.* Payne (1903) 205 Pa. 101; see State *v.* Randolph (1856) 24 Conn. 363; State *v.* Smith (1835) 7 Vt. 141; Commonwealth *v.* Moore (1825) 3 Pick 194, which seems to overrule Commonwealth *v.* Murphy, *supra.* After laying the foundation, the impeaching witness is usually asked, "From that reputation would you believe the witness under oath?" State *v.* Johnson (1888) 40 Kan. 266.

[5]Commonwealth *v.* Payne, *supra.*

[6]1 Greenleaf, Evidence, 578; Crawford *v.* State (1895) 112 Ala. 1; Sorrelle *v.* Craig (1846) 9 Ala. 534.

[7]2 Wigmore, Evidence, 1105; 1 Greenleaf, Evidence, *supra;* Holbrook *v.* Dow (1859) 78 Mass. 357; see Newcomb *v.* Griswold (1862) 24 N. Y. 298.

[8]In a few jurisdictions, however, any crime may be shown. State *v.* Watson (1873) 63 Me. 128, 136; State *v.* Manuel (La. 1913) 63 So. 174. In some others only such crimes as would have disabled the witness, at common law, are admissible; Matzenbaugh *v.* People (1902) 194 Ill. 108, 112; Campbell *v.* State (1853) 23 Ala. 44, 73; State *v.* Randolph, *supra;* while still others admit only crimes which reflect upon the veracity of the witness. See State *v.* Smith, *supra;* Commonwealth *v.* Moore, *supra.*

[9]Newcomb *v.* Griswold, *supra;* Stokes *v.* People (1873) 53 N. Y. 164, 176; Robbins *v.* Spencer (1889) 121 Ind. 594; Pullen *v.* Pullen (1887) 43 N. J. Eq. 136.

cannot be called upon to rebut the charges that may be brought against him.[10] Many jurisdictions, however, forbid all cross-examination as to particular acts irrelevant to the issue,[11] in order to protect witnesses from the attacks of unscrupulous counsel who might otherwise employ the witness stand as an instrument to vilify the entire life of a person who is called to assist the trial by his testimony.[12] The vital importance, however, of being able to test a witness' veracity by cross-examination seems to demand that counsel should be permitted to ask him, even if his only restraint is the sanctity of his oath to testify truthfully, whether he has not been guilty of acts which would, in fact, discredit him before the jury. None the less, as suggested in the recent cases of *State* v. *Reese* (Utah 1913) 135 Pac. 270, and *Avery* v. *State* (Md. 1913) 88 Atl. 148, care must be taken that the questions are not merely veiled calumniations, but do, in fact, reflect upon the witness' veracity.[13] This care, as many jurisdictions wisely recognize, can best be left to the sound discretion of the trial judge.[14] The sacrifice of the witness' dignity, within the limits thus imposed, is likely to be more than counterbalanced by the thoroughness of the investigation of the facts.[15] This rule restrains the needless persecution of witnesses and has the added advantage of enabling the jury to take into consideration the past conduct of a witness, especially when his

[10]For this reason the commission of a crime may be shown by cross-examination of the witness without producing the record of conviction. Although it has been argued in this connection that the best evidence must be produced, the preferable view would seem to be that the information may be elicited on cross-examination of the witness, since there is very little danger of a person making his case weaker than it really is, and, moreover, the failure of an opportunity to produce the record might lead to gross injustice. Wilbur *v.* Flood (1867) 16 Mich. 40; see McLaughlin *v.* Mencke (1894) 80 Md. 83; *contra,* Newcomb *v.* Griswold, *supra;* see Killian *v.* Georgia R. R. (1895) 97 Ga. 727.

[11]Commonwealth *v.* Schaffner (1888) 146 Mass. 512; Cal. Code Civ. Proc. § 2051; see Sharon *v.* Sharon (1889) 79 Cal. 633, 673; Georgia Code (1911) § 5882.

[12]A few cases hold that such testimony is always admissible but that the witness under proper circumstances may avail himself of his privilege of refusing to answer. Boles *v.* State (1871) 46 Ala. 204; State *v.* Ward (1881) 49 Conn. 429, 433, 442. But "of what virtue is the vaunted privilege? Instead of shielding him from being compelled to give evidence against himself, the shield is turned into a sword, and the effect on the jury is worse, if possible, than an admission of the crime, which is assumed in the question, would be." State *v.* Vance (1910) 38 Utah 1, 36.

[13]People *v.* Crapo (1879) 76 N. Y. 288.

[14]Gt. W. Turnpike Co. *v.* Loomis (1865) 32 N. Y. 127; LaBeau *v.* People (1866) 34 N. Y. 223; State *v.* Pfefferle (1886) 36 Kans. 90; City of South Bend *v.* Hardy (1894) 98 Ind. 577; Storm *v.* United States (1876) 94 U. S. 76, 85.

[15]But see 2 Wigmore, Evidence, 1117, where the author says that " . . . if the judiciary were accustomed to exercise their powers fully and freely, there could be no better solution than to vest the control in that discretion. But the judiciary to-day are not always inclined to show to the abuses of cross-examination the disfavor which those abuses deserve. The typical tendency of the modern American judiciary is to abdicate that power of control over the trial which tradition and the due course of justice demand that they shall have, and to become more and more mere umpires, who rule upon errors and make no attempt otherwise to check the misconduct of counsel."

testimony directly conflicts with that of another. Since it leads to a greater possibility of working out justice in each individual case, this flexible policy seems preferable to a rigid rule of exclusion.

PROVABILITY OF CONTINGENT CLAIMS IN BANKRUPTCY.—Among the problems which have been presented to the courts under the Bankruptcy Law of 1898, few have surpassed in complexity that of the provability of contingent claims under § 63a.[1] The fact that the present Act contains no express provision for proving such claims, such as are found in the former Acts of 1841 and 1867,[2] is not conclusive evidence of the intention of Congress that they should not be provable, as the legislators may have thought the provisions of § 63a broad enough to include contingent claims without specific mention. And although a contingent claim may not be "a fixed liability absolutely owing at the time of the filing of the petition," as provided by § 63a (1), it is difficult to imagine a much broader provision than that of § 63a (4), which permits the proving of all debts "founded upon an open account, or upon a contract express or implied."

Many courts, however, have construed the words "absolutely owing" in clause (1) as limiting clause (4) also, suggesting that any other construction would render clause (1) mere surplusage, and on this ground have excluded contingent claims from proof[3]; while other courts attain a similar result where it is impossible to compute the present value of the claim.[4] Thus one whom the bankrupt contracted to indemnify cannot prove his claim against the bankrupt's estate unless loss has been suffered prior to the filing of the petition,[5] nor can a landlord prove a claim for rent accruing subsequent to that date, as was decided in the recent case of *In re J. Sapinsky & Son* (D. C. W. D. Ky. 1913) 206 Fed. 523.[6] Similarly, a claim for attorney's fees stipulated for in a note in case of default in payment and collection by an attorney cannot be proved by the holder when the note

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[1]See 8 Columbia Law Rev. 305. § 63a provides that "debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date. * * * (4) founded upon an open account, or upon a contract express or implied; * * *."

[2]5 Stat. 445; 14 Stat. 525.

[3]*In re* Roth & Appel (C. C. A. 1910) 181 Fed. 667; *In re* Adams (D. C. 1904) 130 Fed. 381.

[4]Dunbar *v.* Dunbar (1903) 190 U. S. 340.

[5]*In re* Ells (D. C. 1900) 98 Fed. 967; Leader *v.* Mattingly (1903) 140 Ala. 444.

[6]Some of the earlier cases refuse to allow claims for rent accruing subsequent to the adjudication on the theory that the adjudication terminates the relation of landlord and tenant. *In re* Jefferson (D. C. 1899) 93 Fed. 948; *In re* Hays, Foster & Ward Co. (D. C. 1902) 117 Fed. 879. This theory would not prevent recovery of rent accruing between the filing of the petition and the adjudication. The later cases, however, have excluded proof of claims for any rent accruing subsequent to the filing of the petition, on the ground that such claims are contingent at that time. Watson *v.* Merrill (C. C. A. 1905) 136 Fed. 359; *In re* Roth & Appel, *supra*. The court in the principal case approves the latter view.